Fair Political Practices Commission

MEMORANDUM

To: Chairman Randolph and Commissioners Downey, Karlan, Knox, and Swanson

From: Galena West, Counsel
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Public Identification of a Conflict of Interest for Public Officials Who Hold Offices Designated in Section 87200 – Amendment of Regulations 18702 and 18702.1; Adoption of Regulation 18702.5.

Date: April 16, 2003

I. Introduction

In March, staff presented for prenotice discussion proposed regulation 18702.5 implementing new section 87105 which was added to the Political Reform Act[1] (the "Act") by Assembly Bill 1797 (Harman). The Commission answered several scope questions at that time, as well as other fundamental aspects of the regulation. Currently, the regulation is being presented for formal adoption with a small number of new determinations remaining.

Assemblyman Harman, the author of the bill, appeared before the Commission at the March 14, 2002 Commission meeting. He strongly urged the Commission to support the bill, and possibly even sponsor it. The author's purpose was also stated in the Senate Rules Committee analysis of the bill from August 6, 2002. Assemblyman Harman's reason and purpose in writing the bill is stated as "the regulations that a public official must follow once they determine that they have a conflict are not clear and often public officials receive conflicting advice from city attorneys and county counsels."

The Commission opposed AB 1797 for several reasons. The Commission determined that the disclosure required would be duplicative of the information already available on Form 700, Commission resources would be put to better use in assuring that public officials are not participating when they have a conflict of interest, rather than the manner of their disqualification, as well as the various application problems within the language (such as the lack of instruction regarding absent public officials and non-meeting settings).

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[1] Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

Moreover, in December 2000, the Commission determined that mandatory public identification of a conflict of interest for all filers was not necessary and was duplicative of the disclosure already present in the Statement of Economic Interests (Form 700).[2] Since 1976, the Commission's regulations have required a disqualified official to declare his or her conflict of interest. (Regulation 18702.1.) The Commission decided to make identification under regulation 18702.1 a permissive requirement instead of a mandatory one.

II. Current Law

The Act prohibits a public official from "making," "participating in making" or otherwise using his or her official position to "influence" a governmental decision in which the official has a financial interest. (Section 87100 et seq.) The procedure to determine if this prohibition applies to a specific governmental decision is embodied in the Commission's Eight-Step Process for determining conflicts of interest. The Eight-Step Process is used to determine if a public official has a financial interest in a governmental decision and if he or she is "making," "participating in making" or "influencing" that decision. (Section 87100, regulations 18700 - 18708.) This process is summarized as follows and is implicated by the new statute 87105 as well as the proposed regulation 18702.5:

Step One: Is the individual a "public official?"

Step Two: Is the public official "making," "participating in making," or "influencing" a governmental decision?

Step Three: What is the "economic interest" of the public official?

Step Four: Are the public official's economic interests directly or indirectly involved in the decision?

Steps Five and Six: What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decisions upon their economic interest will meet this materiality standard?

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

The application of step two is at issue under both the new statute and proposed regulation 18702.5. A public official applies this step to determine whether he or she is involved in the governmental decision. Also, if the public official determines not to act regarding a governmental decision because of a financial interest, this step gives guidance as to what is required of the public official.

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[2] A Statement of Economic Interests or Form 700 is the disclosure document that all public officials are required to file. The amount of disclosure necessary on Form 700 is determined by the public official's position and what is required for that position.

In step two of the Eight-Step Process, the public official must determine if he or she is "making," "participating in making," or "influencing" a governmental decision. To determine if the public official is "making" a governmental decision, he or she applies regulation 18702.1. Under current rules, where the official determines he or she has a conflict of interest, the official must abstain from "making," "participating in making," or "influencing" the decision. In addition, the public "official's determination to abstain *may* be accompanied by an oral or written disclosure of the financial interest."[3] (Regulation 18702.1(a)(5), emphasis added.)

Regulation 18702.1(b) allows a public official to remain "on the dais or in his or her designated seat during deliberations of the governmental decision in which he or she is disqualified." However, the official's presence may not be counted towards achieving a quorum. Subdivision (c) states that a public official may not attend a closed session or obtain non-public information from a closed session regarding the governmental decision.

Further, regulation 18702.4 provides exceptions to when a public official is "making" or "participating in making" a governmental decision. For example, one exception provides that appearances by an official as a member of the general public to represent himself or herself on matters related to personal interests listed in subdivision (b)(1) are not actions which fall into the categories of "making," "participating in making" or "influencing" a governmental decision. Subdivision (b)(1) provides that the public official may appear in the same manner as the members of the public on "personal interests" such as:

> "(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.
>
> "(B) A business entity wholly owned by the official or members of his or her immediate family.
>
> "(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercises sole direction and control."

III. New Statute

Section 87105 creates specific identification and recusal requirements for 87200 filers when the official determines that he or she has a financial interest in a decision. This new section 87105 establishes additional requirements in Step 2 of the standard analysis. The new section provides:

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[3] Also, regulation 18730(b)(10) provides instruction to a public official who has a conflict of interest. Under this regulation, designated employees *may* disclose the disqualifying interest when they determine not to act due to a potential conflict of interest. This rule includes conflicts of interest that usually occur in a non-meeting setting.

> "(a) A public official who holds an office specified in Section 87200 who has a financial interest in a decision within the meaning of Section 87100 shall, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, do all of the following:
>
> "(1) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.
>
> "(2) Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100.
>
> "(3) Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.
>
> "(4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks on the issue.
>
> "(b) This section does not apply to Members of the Legislature."

"A public official who holds an office specified in Section 87200" includes:

> "…elected state officers, judges and commissioners of courts of the judicial branch of government, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, members of the board of supervisors, district attorneys, county counsels, county treasurers, and chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and to candidates for any of these offices at any election." (Section 87200.)

Thus, the statute reimposes a mandatory obligation on certain public officials to declare their conflicts of interest. In addition, it requires those same officials to leave the room. This new requirement to leave the room after an identification of a conflict of interest has never been a requirement under the Act before the new section 87105 took effect on January 1, 2003.

IV. Discussion

A. Regulation 18702.5

New regulation 18702.5 implements and clarifies the new requirements. (Appendix A.) Since the March Commission meeting, staff has reformatted this regulation to incorporate the Commission's decisions.[4] These included:

- The application of the new statute was limited to 87200 filers at any open meeting subject to the provisions of the Bagley-Keene Open Meeting Act or the Brown Act. At all other times, 87200 filers follow the provisions of regulations 18702 and 18702.1, the same as all other public officials abstaining from making a governmental decision.

- Oral identification, not written, will be required when identifying a conflict of interest.

- The public official would have to physically leave the room to comply with the statute and regulation.

- No obligations will be imposed on public officials who are absent when the item is considered.

At the March meeting, the Commission also directed staff to clarify or alter certain subdivisions.[5] These subdivisions, (c), (d)(1) and (d)(3), are addressed later in this memorandum. Subdivision (c), the exception for closed sessions, includes a decision point that is presented directly in response to Commission comments at the March meeting. Subdivisions (d)(1) and (d)(3), the exceptions for consent calendars and speaking as a member of the public, respectively, are clarified in both the regulatory language and in this memorandum, as was requested by the Commission. Specifically, these changes and explanations included:

- Tailoring special identification requirements for closed sessions.

- Elimination of the requirement that an official must speak to stay in the room during a discussion regarding his or her personal interest.

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[4] Technical clarifying changes have also been made to all three of these regulations.

[5] This new language has been noticed through the Office of Administrative Law. Staff has received no additional comments since that time.

- Clarification of the "uncontested-items" exception procedure.

The decisions made at the March meeting have been incorporated into subdivisions (a) through (b)(3). Consistent with the Commission's direction, subdivision (a) limits the scope of the regulation to 87200 filers at open meetings. Subdivision (b)(1) dictates the timing and content of the disclosure. Subdivision (b)(2) creates the requirement that the identification be made orally as part of the public record. Subdivision (b)(3) requires the public official to publicly identify, recuse himself or herself, and then leave the room.[6] However, the following issues have not been finally determined.

1. Decision Point 1: Special Rules for Closed Sessions.

The statute does not contain an express exception for closed sessions. At the March 7th Commission meeting, the Commission expressed concerns about the effect of the statute in the context of closed sessions. When the regulation was presented to the Commission in March, it included the requirement that public officials identify the type of economic interest (i.e. source of income, real property interest) on the public record and recuse himself or herself before leaving the room, even in closed sessions. The Commission determined that this identification could lead to breaches in the confidentiality of the closed session. The Commission instructed staff to present more limited options relating to closed sessions.

Statutory construction and the doctrine of expressio unius est exclusio alterius: Staff first investigated whether closed sessions could simply be excluded from the scope of the statute. However, a basic rule of statutory construction (expressio unius est exclusio alterius) provides that the enumeration of acts, things or persons as coming within the operation or exception of a statute will preclude the inclusion by implication in the class covered or excepted of other acts, things or persons (*Henderson v. Mann Theatres Corp*. (1976) 65 Cal.App.3d 397, 403.) According to this doctrine, since section 87105 includes specific exceptions from the identification requirements, implying an additional exception for closed sessions would be precluded.

The new statute provides three exceptions from these requirements. The first is found in (a)(1) where "disclosure of the exact street address of a residence is not required." The second is in (a)(3) where if "the matter has been placed on the portion of the agenda reserved for uncontested matters," then the requirement to leave the room does not apply. The last exception is located in (a)(4) of the statute and gives the public official the right to "speak on the issue during the time that the general public speaks on the issue." There is no exception for closed sessions.

[6] For a discussion of these subdivisions and decisions, see the February 21, 2003 memorandum, Public Identification of a Conflict of Interest for Public Officials Who Hold Offices Designated in Section 87200 – Adoption of Regulation 18702.5, presented to the Commission at the March 7, 2003 meeting.

However, the rule of "expressio unius est exclusio alterius" is not applied if application of the rule would result in an injustice or run counter to a well-established principle of law. (*In re Christopher T.* (1998) 60 Cal.App.4th 1282, 1290-1291.)

Confidentiality and privileges recognized under law: Confidentiality rules are well established in many different areas of law, including the Act and its regulations. (Government Code sections 11125.8 (hearings against minors), 11126 (Bagley-Keene closed sessions, in general), and 54957 (Brown Act personnel matters closed sessions) and regulation 18708.) Keeping this in mind, the statute should be construed so as to harmonize, if possible, with other laws relating to the same subject (*Isobe v. Unemployment Ins. Appeals Bd*. (1974) 12 Cal.3d 584, 590-591). Statutes must be construed so as to give a reasonable and common sense construction that is consistent with the apparent purpose and intention of the lawmakers. (*People v. Turner* (1993) 15 Cal.App.4th 1690, 1696.) In other words, it is not a reasonable construction of the new statute that the Legislature intended to revoke through implication existing confidentiality rules and privileges.[7]

In light of this statutory analysis, Decision Point 1 has two options limited to closed sessions.

Decision Point 1: Option A: This option limits identification of a conflict of interest to a statement that the public official has a conflict of interest without further detail. This option provides that if the governmental decision is made during a closed session of a public meeting, then:

> "the public identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code section 87100. The declaration shall be made part of the official public record."

This option still requires the public official to publicly identify that a conflict of interest is the reason why he or she is not participating in the closed session. This option also appears to offer the most practical interpretation since the statute does require some public identification of a conflict of interest immediately before recusal and leaving the room.

Moreover, in few circumstances, even this very limited identification requirement could lead to a breach of confidentiality. This could happen, for example, if the public official states that he or she is not participating because of his or her conflict of interest and that official has only one economic interest in the jurisdiction. In that case, the

[7] All presumptions are against a repeal through implication. The presumption against an implied repeal is so strong that to overcome the presumption, the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation (*California Auto. Assigned Risk Plan v. Garamendi* (1991) 234 Cal.App.3d 1486, 1495).

public could easily discern who or what is the topic of the closed session meeting without that information being shared. In order to protect against this rare occurrence, the Comment to regulation 18702.5 states that:

> "Nothing in the provisions of this regulation is intended to cause an agency or public official to make any disclosure that would reveal the confidences of a closed session or any other privileged information as contemplated by law including but not limited to the recognized privileges found in 2 Cal. Code Regs. section 18740."

This language allows for discretion to be used by the official if the limited requirement of option A is still too intrusive. This option provides a meaning to the words of the new statute as well as protecting the confidentiality of the closed session discussions.

Decision Point 1: Option B: Option B imposes no obligation on the public official in closed session settings. This option states that if the governmental decision is made during a closed session of a public meeting:

> "then Government Code section 87105 and this regulation impose no public identification duties on the public official for that closed session meeting."

It could be argued that this exception, although not expressly set forth in the statute, would be consistent with the statute since the statute does not appear to expressly apply to a closed session setting. Since this statute does not appear to contemplate application to closed sessions, an exception for closed sessions may be appropriate.[8]

RECOMMENDATION: Option A harmonizes these two Government Code sections to bring meaning to both. Option A accomplishes this without an undue risk to the confidentiality of closed session items because of the discretion allowed by the Comment. Staff recommends option A.

2. Speaking as a Member of the Public.

Several issues were discussed at the March Commission meeting that staff has clarified in the new version of regulation 18705.2. The first is subdivision (d)(3), "Speaking as a Member of the Public Regarding an Applicable Personal Interest." Section 87105 provides: "(4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks

[8] And, if a statute is silent or ambiguous with respect to a specific issue addressed by regulation, reviewing courts must give deference to the agency's interpretation if it does not conflict with the statute's plain meaning. (*Kmart Corporation v. Cartier, Inc.* (1988) 486 U.S. 281, 108 S.Ct. 1811.)

on the issue."[9] The basis for this exception was a letter submitted by Michael Martello, Mountain View City Attorney, on behalf of the League of Cities. He stated that he sought to ensure that an exception allowing a public official to remain in the room to speak on his or her own personal interests would be included in the new statute.[10]

Mr. Martello believes that by allowing the public official to "speak," he or she was permitted to do more than the literal word suggests. He gave the following example:

> "…members of the public show up in vast numbers on issues of importance to them and believe they are 'speaking' to the council by merely sitting in the audience, catcalling or raising their hands to show support…"

At the March 7th meeting, the Commission directed staff to investigate whether the statute could be construed to allow the disqualified official to hear the discussion on his or her personal interests without speaking. Again, in construing statutes, the Commission is governed by the rules of statutory construction. Under these rules, the statute's plain meaning must be enforced (*U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc*., 508 U.S. 439, 113 S.Ct. 2173), however, a statute should always be construed so as to harmonize with other laws existing at the time of enactment. (*Isobe, supra*.)

Since 1967, the Bagley-Keene Open Meeting Act has required open access to meetings by members of the public. It states:

> "It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceeding of public agencies be conducted openly so that the public may remain informed.
>
> ¶…¶
>
> "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." (Government Code section 11120.)

Also, Bagley-Keene specifies that there be no barriers to attendance at those meetings. It states:

> "No person shall be required, as a condition to attendance at a meeting of a state body, to register his or her name, to provide other information, to complete a questionnaire, or

[9] The term "notwithstanding" means "without prevention or obstruction from or by" or "in spite of" (*King v. Sununu* (1985) 490 A.2d 796, 800).

[10] Mike Martello's March 6, 2003 letter is attached as Appendix B.

> otherwise to fulfill any condition precedent to his or her attendance." (Government Code section 11124.)

A requirement for a public official remain in the room to hear a discussion on his or her personal interests would be in conflict with the Bagley-Keene Act requirement where no "condition precedent" can be required for attendance.

An analysis of any statute begins with the language in which it is framed (*Visalia School District v. Workers' Compensation Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220) and words which are clear and unambiguous should be given their plain meaning (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 547). When applying these rules to the new statute, the word "speak" appears to be clear and unambiguous on its face and means that the speaker must make some verbal utterance to remain in the room.

However, "speak" is not a word to be taken on its own and out of context. The statutory framework for this exception is one that requires a "declaration" and "egress" from the room. It does not prohibit or allow speaking since this is already controlled by section 87100 and its interpretive regulations. When the term "speak" is considered with the descriptive phrase that follows it: "during the time that the general public speaks on the issue," it suggests that the public official should be exempted from the "declaration" and "egress" rules, so long as he or she acts in the same manner as a member of the public. Members of the public do not always "speak" on issues but either have their presence known in other ways or, while intending to speak, are not given the opportunity. Therefore, to clarify any ambiguity created by a literal interpretation of the statute, the regulation continues to contain the permissive command of "may speak," to remain in the room.

In addition, the sentence, "He or she may listen to the public discussion of the matter with the members of the public to determine if he or she needs to speak on his or her personal interest," has been added. This sentence would clarify that the public official is not somehow in violation of the Act if he or she remains in the room but does not speak. In conjunction with the permissive word "may" in the prior sentence, this language provides more guidance and direction to the officials.

3. ***"Speaking" Limited to Personal Interests Identified in Regulation 18702.4***

There is a second issue relating to when an official "may speak" and remain in the room. The exception for speaking as a member of the public, as discussed above, appears to be a codification of the regulatory exception to 87100 for speaking as a member of the general public regarding a public official's personal interests.[11] Under regulation 18702.4, as discussed earlier, appearances by a public official as a member of the general public representing himself or herself on matters related to personal interests listed in

[11] In the alternative, this exception could be expanded to include allowing a public official to stay and speak on any issue. The limitation to only personal interests recognized in regulation 18702.4 was presented at the March meeting and, although approved, more explanation was requested.

subdivision (b)(1) are not actions which fall into the categories of "making" or "participating in making" a governmental decision. Subdivision (b)(1) provides that the public official can appear in the same manner as the members of the public on "personal interests" such as:

> "(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.
>
> "(B) A business entity wholly owned by the official or members of his or her immediate family.
>
> "(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercises sole direction and control."

Staff interprets section 87105 consistent with regulation 18702.4. Under this construction, the statute would allow a public official to remain in the room and speak on a personal financial interest as outlined in regulation 18702.4 but would not allow the official to speak otherwise. In Mike Martello's March 6th letter to the Commission, he explained that when he proposed the exception, it was always inextricably linked to the personal interest limitations of regulation 18702.4.

Moreover, construction of the new language in a manner inconsistent with the familiar exception to section 87100 contained in regulation 18702.4 could create confusion. Additionally, it would constitute an implied amendment to the longstanding interpretation of 87100, which has been construed to prohibit appearances, other than those set forth in regulation 18702.4, since 1976. In enacting any law, the Legislature is presumed to have had knowledge of existing statutory law and judicial decisions pertaining to the subject matter of that law (see *Bailey v. Superior Court* (1977) 19 Cal.3d 970, fn. 10, at 977-978). Also, the Legislature is presumed to know of administrative interpretations, generally found in the form of regulations of the statutes, if the regulation is of "longstanding duration." (*Redevelopment Agency of the City of Long Beach v. County of Los Angeles* (2000) 75 Cal.App.4th 68, determining that an administrative interpretation in existence 27 years was of "longstanding duration.") The rule limiting appearances to only personal interests has been in existence for 27 years, and, therefore, is the presumed knowledge of the Legislature.[12] The rules of statutory construction require an attempt to reconcile statutory provisions relating to the same subject matter whenever possible in order to avoid conflict and give effect to every provision (*Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744, 747).

Also, section 87105 specifically refers to its language being interpreted "within the meaning of section 87100" for definitions of "making," "participating in making," and "influencing" a governmental decision. Section 87105 should be read to be

[12] The rule was amended in 1985 to include a list of examples of what would be considered a "personal interest." (Regulation 18702.5.)

consistent with the regulations interpreting section 87100. These regulations include regulation 18702.4 granting exceptions to what constitutes "making," "participating in making," and "influencing" a governmental decision. To do otherwise would presume that the Legislature did not intend to coordinate the existing rules with the new rule. These rules are not irreconcilable and can easily be read together in harmony to function effectively. Therefore, subdivision (d)(3) of proposed regulation 18702.5 permits an official to speak as a member of the public only when an applicable personal interest is affected.

4. Consent Calendars.

The final issue the Commission asked the staff to further address is embodied in proposed subdivision (d)(1). A public official with a financial interest in an uncontested matter is specifically exempted from the requirement to leave the room in the statute. (Section 87105(a)(3).)

The prior language raised some concerns. It provided:

> "When the matter in which the public official has a financial interest is on the consent calendar, the public official must comply with (c)(1), recuse himself or herself from discussing or voting on the matter but may vote on the remaining consent calendar items. The public official is not required to leave the room for this item."

That language caused confusion as to whether some specific procedure was mandated. Subdivision (d)(1) specifies that "uncontested matters" referred to in the statute is defined as the "agenda items on the consent calendar." (Regulation 18702.5(d)(1).) This clarification will eliminate confusion that the term "uncontested matters" could generate. However, the public official must still comply with the first two requirements of the statute, public identification of the matter and recusal of himself or herself. The exemption is set forth in the subdivision of the statute which is applicable only to the "leave the room" requirement and does not impact the first two requirements. (Section 87105(a)(3).)

The new language does not change the statutory exception nor does the new statute include any new disqualification requirements, but it does allow for the procedures currently used by the agency, board or commission to be continued so long as the first two requirements are met to publicly identify and recuse himself or herself. The language appeared to require that a certain procedure be followed for considering consent calendar items has been removed, leaving only the regulation's interpretation of the requirements of the new statute. By keeping this language broad and encompassing, each official may follow the existing procedures since the procedure used for consent calendars appears to vary from entity to entity. This way, the statute is satisfied but the burden of an arbitrary procedure is not imposed. The alternative would be to discover a

method of identification and vote that would apply to every agency, board or commission situation and apply it across the board.

B. Regulations 18702 and 18702.1

Initially, in order to interpret and apply new statute 87105, the Commission is asked to amend regulations 18702 and 18702.1 (Appendices C and D.) The language added to both regulation 18702 and regulation 18702.1 is similar.[13] These subdivisions are added to each regulation to give direction to 87200 filers as to what to do outside of meetings.[14] This additional paragraph clarifies that there are two different rules applicable to 87200 filers depending on when and where the governmental decision is being considered. The first rule applies when the governmental decision relates to an agenda item that is noticed for a meeting subject to the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.). The second is the standard rule which is applicable to all officials and applies to 87200 filers when considering all other governmental decisions.

The language of the new subdivision is as follows:

> "Notwithstanding subdivision (a) of this regulation, to determine if a public official who holds an office specified in Government Code section 87200 is making, participating in making, or using or attempting to use his or her official position to influence a governmental decision relating to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.) apply 2 Cal. Code Regs. sections 18702.1(a)(1) – (a)(4), 18702.2, 18702.3, 18702.4, and 18702.5." (Regulation 18702.1, Appendix 2.)

Regulation 18702: Existing regulation 18702 provides the roadmap for an official who is "making," "participating in making" or attempting to "influence" a governmental decision by listing which regulations will be applicable under differing circumstances. Since regulation 18702.5 applies when an official is performing any of these three actions, the amendment to regulation 18702 is necessary for consistency and guidance.

The additional subdivision clarifies exactly when the new regulation 18702.5 is applicable. Without it, an 87200 filer would not be aware of the additional requirements found in regulation 18702.5.

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[13] The amendment to regulation 18702 is added as new subdivision (b) and in regulation 18702.1 the subdivision is (d).

[14] In regulation 18702, subdivision (a) is applicable to all filers, while the new subdivision (b) applies only to 87200 filers at open meetings. The same is true for subdivisions (a), (b) and (c) of regulation 18702.1 with new subdivision (d) only applying to 87200 filers at open meetings.

Regulation 18702.1: Even though regulation 18702.1 appears to be limited to a definition of "making a governmental decision," it also outlines the steps for officials to follow when abstaining from making a governmental decision. As discussed below, these steps will continue to be applicable to 87200 filers "making," "participating in making," or "influencing" governmental decisions anytime other than at open, public meetings subject to the Bagley-Keene Act and the Brown Act. This is because these are the steps followed by all public officials whenever they are abstaining from making a governmental decision because of a financial interest.

The additional subdivision is necessary to help 87200 filers comply with the new requirements. Without this cross-reference and additional information, when an 87200 filer "makes" a decision through abstaining from a vote, he or she could mistakenly apply the requirements of regulation 18702.1(a)(5) – the general rule – without knowledge that a more specific rule exists.

V. Conclusion

Staff recommends that the Commission approve the amendments to regulations 18702 and 18702.1, and the adoption of proposed regulation 18702.5 with the changes discussed in this memorandum (in the sections entitled "Speaking as a Member of the Public," "'Speaking' Limited to Personal Interests Identified in Regulation 18702.4" and "Consent Calendars") which were drafted in response to the Commission's concerns and public comment.

Attachments*:*

Appendix A – Regulation 18702.5
Appendix B – Letter from Michael D. Martello, City of Mountain View City Attorney entitled Agenda Item No. 6 – Adoption of Regulation 18702.5 Public Identification of a Conflict of Interest for Section 87200 Filers (March 6, 2003).
Appendix C – Regulation 18702
Appendix D – Regulation 18702.1